U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 32826124

Date: AUG. 26, 2024

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner is a nonprofit mental health provider seeking to classify the Beneficiary as an alien of extraordinary ability as a medical director of one of their organizational divisions. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Nebraska Service Center Director denied the Form I-140, Immigrant Petition for Alien Workers (petition), concluding the record did not establish that the Beneficiary had a major, internationally recognized award, nor did the Petitioner demonstrate that he met at least three of the ten regulatory criteria. The matter is now before us on appeal. The Petitioner bears the burden of proof to demonstrate eligibility to U.S. Citizenship and Immigration Services (USCIS) by a preponderance of the evidence. Section 291 of the Act; *Matter of Chawathe*, 25 I&N Dec. 369, 375 (AAO 2010). We review the questions in this matter *de novo*. *Matter of Christo's Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon *de novo* review, we will dismiss the appeal.

I. LAW

To qualify under this immigrant classification, the statute requires the filing party demonstrate:

- The foreign national enjoys extraordinary ability in the sciences, arts, education, business, or athletics;
- They seek to enter the country to continue working in the area of extraordinary ability; and
- The foreign national's entry into the United States will substantially benefit the country in the future.

Section 203(b)(1)(A)(i)–(iii) of the Act. The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2).

The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-step analysis. In the first step, a petitioner can demonstrate international recognition of his or her achievements in the field through a one-time achievement (that is, a major, internationally recognized award). If that petitioner does not submit this evidence, then he or she must provide sufficient qualifying documentation that meets at least three of the ten criteria listed at 8 C.F.R. § 204.5(h)(3)(i)–(x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then move to the second step to consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115, 1121 (9th Cir. 2010) (discussing a two-step review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022).

II. ANALYSIS

Because the Petitioner has not indicated or established that the Beneficiary has received a major, internationally recognized award, it must show that he can satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)–(x). Before the Director, the Petitioner claimed the Beneficiary met five of the regulatory criteria. The Director decided that the evidence relating to the Beneficiary satisfied one of the criteria relating to a high salary or remuneration, but it had not satisfied the criteria associated with membership, published material, judging, or a leading or critical role. On appeal, the Petitioner pursues its claims relating to judging and a leading or critical role, but only in the sense that the Director added requirements that are not included in the regulation. We note those claims were presented on the Form I-290B, Notice of Appeal or Motion, in Part 7 and the appeal reflects the Petitioner would submit their brief and/or additional evidence to this office within 30 calendar days after filing their appeal. However, the Petitioner has not provided anything further to date.

> *Evidence of the alien's participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought.* 8 C.F.R. § 204.5(h)(3)(iv).

This criterion requires that the Petitioner produce evidence the Beneficiary actually participated as a judge. Additionally, these duties must have been directly judging the work of others in the same or an allied field in which the Beneficiary seeks their immigrant classification within the present petition. The Petitioner must submit evidence satisfying all of these elements to meet the plain language requirements of this criterion.

In the initial filing before the Director, the Petitioner claimed the Beneficiary performed judging duties as a member of two committees within the petitioning organization, as well as those he performed as an adjunct professor. Relating to the committees, the Petitioner claimed he measured and evaluated all areas of practitioner competency for care provided at the petitioning organization and they indicated he was responsible for reviewing and monitoring credentials of medical staff. They further asserted that in his role as an adjunct professor, the Beneficiary provided guidance and instructions to students

in which he ultimately evaluated their work. The only evidence the Petitioner offered consisted of a committee charter and an internal policy document relating to the responsibility of members of those committees, but it did not submit documentation demonstrating the Beneficiary actually performed any of those claimed judging functions. The Director correctly did not accept the general documentation of what committee members do as direct evidence of what functions the Beneficiary actually performed.

And we note within the request for evidence (RFE), the Director requested "documentation that will be helpful to assist us in determining whether you served as a judge, and at what level, such as independent and objective documentation about the event or occasion where you served as judge, the work that you judged, the level of the participants, how you were selected as an official judge, and evidence conveying when your judging occurred." In response the Petitioner only submitted a copy of an unpublished district court decision, *MRC Energy Co. v. U.S. Citizenship & Immigr. Servs.*, No. 3:19-CV-2003-K, 2021 WL 1209188, at *11 (N.D. Tex. Mar. 31, 2021), but they offered no material pertaining to the Director's specific request.

Because the Director put the Petitioner on notice that the submitted evidence was insufficient, the Petitioner's failure to submit requested evidence that precludes a material line of inquiry shall be grounds for denying the petition. 8 C.F.R. § 103.2(b)(14). Similar to the situation identified within 8 C.F.R. § 103.2(b)(13)(i) which states: "If the Petitioner or applicant fails to respond to a request for evidence or to a notice of intent to deny by the required date, the benefit request may be summarily denied as abandoned," the failure to respond to a specific element of the RFE also is considered to be abandonment of the Petitioner's eligibility claims relating to that element. As the Petitioner did not respond to the Director's RFE relating to the Beneficiary's performance as a judge, it is considered abandoned.

The Petitioner argues on appeal that the Director unilaterally added to the plain language requirements of the regulation, the requirement that the beneficiary must participate in judging outside of his job. The Director's denial decision quoted the RFE stating:

> USCIS does not find that working for a company performing duties, specific tasks, and activities (reviewing) on behalf of that company is a tantamount to "judging" the work of others in one's field for purposes of this criterion. Duties or activities inherent or routine in the occupation itself which nominally fall under a given regulatory criterion at 8 C.F.R. § 204.5(h)(3) do not demonstrate that the beneficiary participated either individually or on a panel, as a judge of the work of others in the same or an allied field of endeavor.

The Director's denial decision further stated:

> Incidental evaluation responsibilities inherent to one's position do not establish that the beneficiary served in an official capacity, either individually or on a panel, as a judge of the work of others. USCIS notes, that in an occupation where reviewing the work of others is an inherent duty of the occupation, simply performing one's job-related duties demonstrates competency but is not evidence that one's "achievements have been recognized in the field of expertise."

We note this quote's final sentence incorporates analysis we might include in a final merits determination, but not under the regulatory criterion.

Within the Petitioner's RFE response, they cited to the *MRC Energy Co.* district court opinion to demonstrate the Director was incorrect in indicating the Beneficiary must judge the work of others outside of his job. There, the Petitioner asserted that the Director's decision imposed an extra-regulatory requirement by discounting the Beneficiary's judging activities in the course of his employment. And we agree with that aspect of the Petitioner's arguments on appeal.

Nevertheless, the regulation requires a petitioner to provide "evidence of [the Beneficiary's] participation, either individually or on a panel, as a judge of the work of others in the same or an allied field of specification for which classification is sought." 8 C.F.R. § 204.5(h)(3)(iv). The Director's denial addressed the aspect of judging the work of others in the field when they stated that "[t]he regulation cannot be read to include every informal instance of evaluating organizations subordinate employees."

But the Petitioner doesn't address that aspect of the decision in the appeal, and our focus here is whether the Petitioner demonstrated that the Beneficiary judged the work of others in the field. While the Petitioner's appeal briefly addresses the issue of whether his judging duties may occur within his job functions, they did not argue how the Beneficiary's work duties amount to judging under this criterion. So, they not only failed to address that issue when responding to the RFE, but also in the appeal. Every basis of the adverse decision must be addressed in the appeal, otherwise we consider it to be abandoned within this and any subsequent proceeding based on this petition. *See Matter of Garcia*, 28 I&N Dec. 693, 693 (BIA 2023) (finding arguments that do not meaningfully challenge any aspect of the underlying decision are deemed waived on appeal).

In summary, the Petitioner has not presented appellate arguments or submitted evidence that meets the plain language requirements of this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

We conclude that although the Petitioner offered evidence satisfying the high salary or remuneration criterion, it does not meet the criteria regarding judging. While it argues and submits evidence for one additional criterion on appeal relating to the Beneficiary's performance in a leading or critical role at 8 C.F.R. § 204.5(h)(3)(viii), it is unnecessary that we make a decision on this additional ground because it cannot numerically meet the required number of criteria.

As the Petitioner cannot fulfill the initial evidentiary requirement of three criteria under 8 C.F.R. § 204.5(h)(3), we reserve the remaining leading or critical role issue. *Patel v. Garland*, 596 U.S. 328, 332 (2022) (citing *INS v. Bagamasbad*, 429 U.S. 24, 25–26 (1976) (finding agencies are not required to make "purely advisory findings" on issues that are unnecessary to the ultimate decision)); *see also Matter of Chen*, 28 I&N Dec. 676, 677 n.1, 678 (BIA 2023) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).

III. CONCLUSION

The Petitioner has not submitted the required initial evidence of either a one-time achievement or documents that meet at least three of the ten criteria. As a result, we do not need to provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119–20. Nevertheless, we advise that we have reviewed the record in the aggregate, concluding it does not support a finding that the Petitioner has established the acclaim and recognition required for the classification sought.

The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than for individuals progressing toward that goal. USCIS has long held that even athletes performing at the major league level do not automatically meet the "extraordinary ability" standard. *Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994). Here, the Petitioner has not shown the significance of their work is indicative of the required sustained national or international acclaim or that it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A). Moreover, the record does not otherwise demonstrate that the Petitioner has garnered national or international acclaim in the field, and they are one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) and 8 C.F.R. § 204.5(h)(2).

For the reasons discussed above, the Petitioner has not demonstrated the Beneficiary's eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.